1980

Establishing an Objective Intent Standard for the Labor Antitrust Exemption: Consolidated Express, Inc. v. New York Shipping Association

Minn. L. Rev. Editorial Board

Case Comments

Establishing an Objective Intent Standard for the Labor Antitrust Exemption: *Consolidated Express, Inc. v. New York Shipping Association*

Shortly after World War II, cargo ships, traditionally loaded directly by longshoremen, were fitted with standardized containers.[1] These containers could be loaded and unloaded—stuffed and stripped, in shipping terminology—away from the pier, giving rise to the business of "consolidation"[2] of containers and decreasing the demand for longshoremen's labor.[3] Containerization became a source of dispute between the International Longshoremen's Association (ILA) and the shippers, and after an initial acquiescence by the union,[4] collective bargaining between the ILA and the New York Shipping Association (NYSA) resulted in promulgation of the Rules on Containers (the Rules). The Rules, which provided that all stuffing and stripping of cargo within fifty miles of the dock must be done by ILA labor, were enforced by the imposition of fines[5] and the refusal by NYSA members to supply containers

1. Cargo is loaded into the containers which are then placed on a ship. *See* Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494, 498 (3d Cir. 1979).

2. Consolidation, one aspect of containerization, is the process of packing together the cargo of various customers who ship less than container-load lots. *See id.*

3. Traditional cargo handling costs at the port have been estimated to account for up to 70% of total shipping costs. Containerization reduces costs (including damages, insurance, customs time, and paper work) and dead time in port. The result is a startling jump in labor productivity and a reduction in the demand for labor. *See* Ross, *Waterfront Labor Response to Technological Change: A Tale of Two Unions*, 21 LAB. L.J. 397, 399-400 (1970).

4. In 1959 the ILA was at a low point of organizational strength. Investigations into the corruption and malfeasance of some of its officers had led to its expulsion from the American Federation of Labor (AFL) in 1953 and had resulted in faction and a lack of centralized control within the organization. *See id.* at 400. The 1959 collective bargaining agreement with the shippers "conceded that 'any employer shall have the right to use any and all types of containers without restriction.'" *Id.* at 401.

5. *See* Consolidated Express, Inc. v. New York Shipping Ass'n, 452 F. Supp. 1024, 1027 n.3 (D.N.J. 1977), *modified*, 602 F.2d 494 (3d Cir. 1979). These fines were imposed by NYSA on its members for any container that passed

to any off-pier consolidators operating in violation of the Rules.[6]

Consolidated Express (Conex) and Twin Express (Twin), consolidators operating between Puerto Rico and the Port of New York, suffered a loss of business due to the operation of the Rules on Containers.[7] They sought and obtained a National Labor Relations Board (NLRB) finding that the NYSA, the ILA, and others[8] violated National Labor Relations Act (NLRA) section 8(b)(4), which prohibits union coercion of an employer to cease dealings with another employer,[9] and section 8(e), which prohibits agreements between unions and employers to cease such dealings.[10] Conex and Twin then brought an action for

---

through the Port and did not comply with the provisions of the Rules. 602 F.2d at 499.

6. *See* Consolidated Express, Inc. v. New York Shipping Ass'n, 452 F. Supp. 1024, 1028 (D.N.J. 1977), *modified*, 602 F.2d 494 (3d Cir. 1979).

7. Defendant vessel owners, *see* note 8 *infra*, who together with one other vessel owner controlled all containers for shipping between Puerto Rico and New York, refused to supply Conex and Twin with empty containers. Cargo already loaded into containers by Conex and Twin was stripped and restuffed using ILA labor at the New York pier for shipment to Puerto Rico. 602 F.2d at 499.

8. In addition to the NYSA and the ILA, other defendants included International Terminal Operating Company, John M. McGrath Corporation, Pittson Stevedoring Corporation, United Terminals Corporation, and Universal Maritime Services Corporation (all stevedores); and Sea-Land Service and Seatrain Lines (operators of vessels engaged in common carriage between Puerto Rico and the Port of New York). *Id.* at 498.

9. Section 8(b)(4)(ii)(B) makes it an unfair labor practice

> to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is—forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

29 U.S.C. § 158(b)(4)(ii)(B) (1976).

10. Section 8(e) reads in relevant part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any conduct or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

29 U.S.C. § 158(e) (1976).

The General Counsel of the NLRB, acting pursuant to section 10(*l*) of the Labor-Management Relations Act (LMRA), 28 U.S.C. § 160(*l*), obtained a preliminary injunction of enforcement of the Rules against Conex and Twin pending Board disposition of the case. Balicer v. International Longshoremen's Ass'n, 364 F. Supp. 205 (D.N.J.), *aff'd mem.*, 491 F.2d 748 (3d Cir. 1973) (Conex); Balicer v. International Longshoremen's Ass'n, 86 L.R.R.M. 2559 (D.N.J. 1974) (Twin). The NLRB found that enforcement of the agreement embodied in the Rules on Containers violated § 8(b)(4)(ii)(B) and that the agreement itself, because it was not justified on work preservation grounds, *see* note 21 *infra*, violated § 8(e). To reach its results the NLRB first concluded that the work

treble damages under the federal antitrust laws.[11] The district court refused summary judgment for plaintiff in order to consider further the applicability of the labor antitrust exemption.[12] On appeal from the denial of summary judgment,[13] the Court of Appeals for the Third Circuit remanded, *holding* that although the existing labor antitrust exemption was not applicable to the conduct in this case, a new exemption arose in antitrust treble damage actions for conduct violative of labor law when the defendants could not reasonably foresee that their agreement was unlawful under labor law, the agreement was "intimately related" to an object of collective bargaining thought at the time to be legitimate, and the agreement imposed no more restraints than necessary. *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979).

The existing labor antitrust exemption is composed of legislative and judicial exemptions designed to balance the interests of labor organizations with those of a competitive economy. Under initial interpretations of the Sherman Act,[14] whose broad provisions were designed to protect a competitive economy, labor organizations were considered "combination[s] 'in restraint of trade.' "[15] In response to the large number of

---

traditionally done by the ILA was the loading and unloading of ships, and that this work was distinguishable from the stuffing and stripping of containers. The NLRB ordered a cease-and-desist order, International Longshoremen's Ass'n (Consolidated Express, Inc.), 221 N.L.R.B. 956, 90 L.R.R.M. 1655 (1975), which was enforced by the Second Circuit International Longshoremen's Ass'n v. NLRB, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977).

11. Conex and Twin claimed that the defendant's actions, *see* note 7 *supra*, constituted a group boycott violative of §§ 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3 (1976). Plaintiffs sued for damages under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976), which allows recovery of treble damages for any violation of the antitrust laws. Plaintiffs also brought an action under § 303(b) of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 187(b) (1976), which grants a private right of action for actual damages that result from violation of § 8(b)(4) of the NLRA.

12. 452 F. Supp. at 1031, 1043-44. In the § 4 antitrust claim, the court found that an examination of anticompetitive effect and anticompetitive intent was warranted. *Id.* at 1044. In the LMRA § 303(b) action, the court gave collateral estoppel effect to the NLRB's finding of labor law violations. The court refused summary judgment on the violations count, however, in order to consider whether Conex operations that were in violation of ICC licensing law would raise an illegality defense. *Id.* at 1036.

13. Interlocutory appeal was taken pursuant to 28 U.S.C. § 1292(b) (1976). The Third Circuit granted summary judgment on the LMRA § 303(b) claim, disallowing any defenses, but remanded on the § 4 claim. 602 F.2d at 527.

14. Ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).

15. Loewe v. Lawlor, 208 U.S. 274, 292 (1908). Prior to the passage of the Sherman Act, labor organizations had been found illegal under a criminal con-

cases brought against unions under this interpretation,[16] Congress passed a series of legislative acts exempting certain labor activity from antitrust scrutiny.[17] Subsequent interpretation of these enactments held labor unions exempt from antitrust liability so long as they acted in their self-interest and did not combine with non-labor groups.[18]

---

spiracy theory. People v. Fisher, 14 Wend. 9 (N.Y. 1835). *See* M. HANDLER, CASES AND MATERIALS ON LABOR LAW 304-05 (1944).

16. Under this interpretation, more antitrust actions were brought against labor unions than against capital combinations. *See* Moeller, *Employee Rights and Antitrust Liability Liability: Organized Labor's Exemption after* Connell, 48 MISS. L.J. 713, 714 (1977); Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14, 31 (1963).

17. Sections 6 and 20 of the Clayton Act exempted union members "lawfully carrying out the legitimate objects" of the union, ch. 323, § 6, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 17 (1976)), and "labor dispute[s] concerning terms or conditions of employment," ch. 323, § 20, 38 Stat. 738 (1914) (codified at 29 U.S.C. § 52 (1976)), from Sherman Act liability. The main goal of these provisions was to exempt the basic union tools of strikes and primary boycotts. *See* United States v. Hutcheson, 312 U.S. 219, 229-30, 233-36 (1941). The Supreme Court, however, initially narrowly interpreted these provisions, resubmitting unions to much of the same antitrust liability. *See, e.g.*, Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n, 274 U.S. 37 (1927); United States v. Brims, 272 U.S. 549 (1926); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921). The Supreme Court eventually retreated from this approach and began to limit liability either by examining whether the union possessed a subjective intent to limit interstate commerce as opposed to the process of manufacture, *see* United Leather Worker's Local 66 v. Herkert & Meisel Trunk Co., 265 U.S. 457, 471 (1924); UMW v. Coronado Coal Co., 259 U.S. 344, 411-13 (1922), or by differentiating between intent to affect the product and intent to affect the labor market. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 510-13 (1940).

Congress also reacted by enacting the Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101-115 (1976)), which prohibits courts from issuing injunctions in labor disputes, 29 U.S.C. §§ 101, 107 (1976), and broadens the definition of such disputes, 29 U.S.C. § 113 (1976), and by enacting the National Labor Relations Act (NLRA), ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-166 (1976 & Supp. II 1978)), which gives employees the right to organize and engage in concerted activities previously subject to antitrust liability. 29 U.S.C. § 157 (1976).

18. *See* United States v. Hutcheson, 312 U.S. 219, 232 (1941). *Compare* Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 809-11 (1945) (an illegal combination with non-labor groups is found when a union joins a business conspiracy for the purpose of market control) *with* Hunt v. Crumboch, 325 U.S. 821, 823-24 (1945) (no antitrust liability when unilateral action by a union acting on a personal vendetta forces an employer out of business). Until the *Pennington* and *Jewel Tea* decisions in 1965, *see* notes 23-25 *infra* and accompanying text, cases following the *Allen Bradley* and *Hunt* decisions did not significantly depart from the unilateral action/self-interest test. *See* Los Angeles Meat & Provision Drivers Union v. United States, 371 U.S. 94, 99-101 (1962); United States v. Employing Plasterers Ass'n, 347 U.S. 186, 190 (1954); United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 461-63 (1949); United Bhd. of Carpenters & Joiners v. United States, 330 U.S. 395 (1947); Zimmer & Silberman, *Pennington and Jewel Tea: Antitrust Impact on Collective Bargaining*, 11 ANTITRUST BULL. 857, 863-64 (1966). Short of a combination with a business conspiracy, however,

While establishing this legislative antitrust exemption, Congress also refined national labor policy by amending the NLRA.[19] Congress expressed strong support for the process of collective bargaining[20] and placed an explicit duty on unions and employers to negotiate the terms of certain mandatory subjects.[21] This process of negotiation and agreement between

---

this statutory exemption was thought to protect most union activity from antitrust liability. *See* Zimmer & Silberman, *supra*, at 862-64.

19. Much of the activity that had been scrutinized under antitrust law became an unfair labor practice when Congress refined the NLRA by enacting the Labor-Management Relations (Taft-Hartley) Act, ch. 120, § 61 Stat. 136. (1947) (codified at 29 U.S.C. §§ 141-167 (1976 & Supp. II 1978)), which prohibits most secondary activity. 29 U.S.C. § 158(b)(4) (1976). *See* Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws*, 32 U. CHI. L. REV. 659, 669 (1965). "The element of 'secondary activity' is introduced [into the context of a boycott] when there is a refusal to have dealings with one who has dealings with the offending person." Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 271 (1959)). The Taft-Hartley Amendments also provide injunctive relief. 29 U.S.C. § 160(*l*) (1976). The Labor-Management Reporting and Disclosure (Landrum-Griffin) Act, Pub. L. No. 86-257, § 201(e), § 704(a)-(c), 73 Stat. 519 (1959) (codified at 29 U.S.C. § 158(a)(3), (b)(4), (b)(7), (e), (f) (1976)), prohibits hot cargo agreements (agreements between a union and an employer requiring that the employer not handle the cargo of another employer). *See also* St. Antoine, *Secondary Boycott: From Antitrust to Labor Relations*, 40 ANTITRUST L.J. 242, 252-53 (1971). The Landrum-Griffin Act also provides a private right of action for actual damages for violation of § 8(b)(4) of the NLRA. 29 U.S.C. § 187 (1976).

20. It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1976).

21. Mandatory subjects of collective bargaining are defined by § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1976), to include "wages, hours, and other terms and conditions of employment." Such mandatory subjects of bargaining also include work preservation, which involves efforts by the bargaining unit employees to preserve for themselves work traditionally done by that unit. *See* Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 210-15 (1964). Work preservation is distinguished from work acquisition, which refers to efforts to obtain work *not* traditionally done by the bargaining unit. The distinction rests on whether the employees of the bargaining unit are attempting to influence their primary employer or other, secondary employers. *See* Comment, *Work Recapture Agreements and Secondary Boycotts:* ILA v. NLRB (Consolidated Express, Inc.), 90 HARV. L. REV. 815, 821 (1977). Although agreements concerning work preservation have been protected from secondary proscriptions by virtue of their mandatory classification, National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 633-42 (1967), agreements concerning work acquisition are not protected and violate labor law. NLRB v. Enterprise Ass'n of Pipefitters Local 638, 429 U.S. 507, 514-21 (1977). Although conceptually appealing, the preservation-acquisition distinction fails when dealing with the problem of work reacquisition. Reacquisition refers to the recapturing of work traditionally done by

a union and an employer, however, could be interpreted as a combination with a non-labor group and thus beyond the protection of the statutory antitrust exemption. Without such protection, *any* collective bargaining agreement that imposed market restraints could be seen as an agreement in restraint of trade.[22] To guard against this view, courts created a non-statutory exemption that protects some collective bargaining agreements having anticompetitive effects.

The non-statutory exemption, which is highly intertwined with specific statutory provisions and general congressional expressions of support, originated in *UMW v. Pennington*[23] and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[24] No opinion in these companion decisions commanded a majority, and thus the precise boundaries of the non-statutory exemption "are neither clear nor entirely coherent."[25] Commentators

---

workers of the bargaining unit but which now, because of technological change, is done in a different manner. Comment, *supra*, at 821. Lower courts and the NLRB have not ruled consistently with regard to whether reacquisition is a protected union goal. For decisions taking a narrow view of reacquisition (examining a specific description of the work performed and the manner of performance), see, for example, Associated Gen'l Contractors, Inc. v. NLRB, 514 F.2d 433, 438 (9th Cir. 1975), Local 282, Teamsters (D. Fortunato, Inc.), 197 N.L.R.B. 673, 678, 80 L.R.R.M. 1632, 1637-38 (1972). For those taking a broader view of work reacquisition, see, for example, Local 742, United Bhd. of Carpenters & Joiners v. NLRB, 533 F.2d 683, 690 (D.C. Cir. 1976); Canada Dry Corp. v. NLRB, 421 F.2d 907, 909-10 (6th Cir. 1970); Retail Clerks Local 648 (Brentwood Mkts., Inc.), 171 N.L.R.B. 1018, 68 L.R.R.M. 1219 (1968). For a general discussion of the topic, see Comment, *supra*.

Some court decisions have found the Rules on Containers a valid work preservation device. *See, e.g.*, International Longshoremen's Ass'n v. NLRB, 613 F.2d 890 (D.C. Cir. 1979), *cert. granted*, 100 S. Ct. 727 (1980) (No. 79-1082); Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884 (2d Cir. 1970). Others have found the Rules violative of labor law. *See, e.g.*, International Longshoremen's Ass'n Local 1575 v. NLRB, 560 F.2d 439 (1st Cir. 1977); Humphrey v. International Longshoremen's Ass'n, 548 F.2d 494 (4th Cir. 1977) (dictum); International Longshoremen's Ass'n v. NLRB, 537 F.2d 706 (2d Cir. 1976).

22. *See* note 104 *infra*.

23. 381 U.S. 657 (1965).

24. 381 U.S. 676 (1965). Some commentators also include the *Allen Bradley* decision, *see* note 18 *supra*, as a source for the non-statutory exemption. *See* Mann, Powers, & Roberts, *The Accommodation Between Antitrust and Labor Law: The Antitrust Labor Exemption*, 30 LAB. L.J. 295, 297 (1979).

25. Smith v. Pro-Football, 420 F. Supp. 738, 742 (D.D.C. 1976). The *Pennington* case arose from a small mining company's claim that the UMW and certain large coal producers agreed to eliminate competition in the coal industry in order to solve the problem of overproduction. To that end, the union allegedly agreed to impose the terms of the Wage Agreement on all coal producers, regardless of their ability to pay. The Supreme Court held that such allegations, if proved, would strip the collective bargaining agreement of its antitrust immunity. Three separate opinions were written in the case. Justice White's opinion focused on the notion of employer conspiracy to which the

generally look to Justice White's opinions[26] in the two deci-

union becomes a party. 381 U.S. at 664-66 (White, J.). Although Justice White viewed the "basic defect" of the agreement to be the restraint on the union's freedom to act, *id.* at 668 (White, J.), he did not view this restraint as alone sufficient to strip the collective bargaining agreement of its antitrust immunity. Justice White required that conspiracy be demonstrated by some "additional evidence" beyond the agreement itself. *Id.* at 665 n.2 (White, J.). Justice Douglas' concurring opinion interpreted this as requiring predatory intent. *Id.* at 672-73 (Douglas, J., concurring). However, given Douglas' reference to Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939), and its doctrine of "conscious parallelism," he apparently would be willing to infer such intent from the collective bargaining agreement itself. *See* Cox, *Labor & the Antitrust Laws: Pennington and Jewel Tea*, 46 B.U.L. REV. 317, 323 (1967); DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. PITT. L. REV. 705, 718 (1972); Note, *Labor-Antitrust: Collective Bargaining and the Competitive Economy*, 20 STAN. L. REV. 684, 706 (1968); Comment, *Labor's Antitrust Exemption*, 55 CALIF. L. REV. 254, 262 (1967) [hereinafter cited as California Comment]; Comment, *Union-Employer Agreements and the Antitrust Laws: The Pennington & Jewel Tea Cases*, 114 U. PA. L. REV. 901, 922-23 (1966) [hereinafter cited as Pennsylvania Comment]. Justice Goldberg's dissent in *Pennington*, which also served as his concurrence in *Jewel Tea*, took exception to an assumption made by Justice White: that even mandatory subjects of bargaining could be subject to antitrust liability. 381 U.S. at 664-65 (Goldberg, J., dissenting and concurring). To protect a "basic element" of collective bargaining, Justice Goldberg argued, all such mandatory subjects should automatically be exempt, *id.* at 710, (Goldberg, J., dissenting and concurring), and the definition of mandatory subjects should be expanded. *See* Comment, *Labor's Antitrust Exemption After* Pennington & Jewel Tea, 66 COLUM. L. REV. 742, 760-61 (1966) [hereinafter cited as Columbia Comment]; Pennsylvania Comment, *supra*, at 927-28.

Jewel Tea, the companion decision to *Pennington*, concerned a collective bargaining agreement negotiated by a union and an association of employers, in which the union sought a provision limiting marketing hours for meat sales. The district court found no evidence to support a conspiracy allegation and concluded that the marketing hours restriction was designed to support the union members' interests in conditions of employment. The Supreme Court found the agreement exempt from antitrust scrutiny. The Justices split along the same lines as in *Pennington*, and no opinion claimed a majority. Justice White's *Pennington* analysis was unnecessary, because the district court's finding of no conspiracy was not disturbed on appeal. For a labor antitrust exemption to apply, Justice White required, apparently in addition to a lack of a business conspiracy, that the agreement be "intimately related" to legitimate union goals and achieved through "bona fide, arm's-length bargaining in pursuit of . . . labor union policies." 381 U.S. at 689-90 (White, J.). Justice Douglas, in his dissent in *Jewel Tea*, disputed the district court's finding of no conspiracy, stating as in *Pennington* that predatory intent to form an anticompetitive conspiracy may be inferred from the collective bargaining agreement itself. *Id.* at 737 (Douglas, J., dissenting).

26. Justice White's opinions are seen as a middle ground between Justice Goldberg's broad labor perspective and Justice Douglas' narrow antitrust perspective. Siegal, Connolly, & Walker, *The Antitrust Exemption for Labor—Magna Carta or Carte Blanche?*, 13 DUQ. L. REV. 411, 453 (1975). Justice White's approach, however, has been criticized for failing to provide consistent criteria with which to judge union conduct. *See* DiCola, *supra* note 25, at 725; Columbia Comment, *supra* note 25, at 757-59. Justice Goldberg's approach has been viewed as providing the only "systematic rationale". Cox, *supra* note 25, at 328.

sions and derive a two-pronged test to determine the availability of the exemption.[27]

The first part of the test is lack of business "conspiracy." In interpreting this test, one commentator has focused on whether the union's agreement with one employer restricts its ability to negotiate freely with other employers.[28] Another view is that the collective bargaining agreement itself is sufficient to constitute the necessary conspiracy.[29] Neither of these interpretations of the conspiracy test, however, is persuasive to most commentators or courts.[30] "Conspiracy" is generally defined as some action or subjective intent to further a goal outside the collective bargaining agreement.[31] Most often this goal is to damage competitors of the negotiating employer.[32]

The second part of the test for the applicability of the nonstatutory antitrust exemption under *Pennington* and *Jewel Tea* is that the agreement be "intimately related" to a legitimate union goal. It is not clear from Justice White's opinion what should constitute a legitimate labor goal.[33] Commentators have viewed the category of legitimate labor goals as comprising a

---

27. *See* Handler, *Recent Antitrust Developments—1965*, 40 N.Y.U. L. REV. 823, 825 (1965); Moeller, *supra* note 16, at 722; Zimmer & Silberman, *supra* note 18, at 869 (citing Handler, *supra*, at 825); California Comment, *supra* note 25, at 260; Comment, *Application of Sherman Act to Labor Union*, 50 TUL. L. REV. 418, 422-23 (1976). *But see* Comment, *Labor's Antitrust Immunity After* Connell, 25 AM. U.L. REV. 971, 979 (1976) [hereinafter cited as American University Comment].

28. *See* Comment, *Dimunition of Labor's Immunity under Antitrust Law*, 21 LOY. L. REV. 980, 986-88 (1975).

29. This is Justice Douglas' view in *Pennington*, *see* note 25 *supra*, and is consistent with antitrust definitions of conspiracy as nothing more than agreement among parties. *See, e.g.*, Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).

30. The interpretations are troublesome because collective bargaining agreements commonly result both in restrictions on a union's freedom of action (e.g., most favored nation clauses, association bargaining), and in product market restraints, *see* note 104 *infra* and accompanying text. *See* DiCola, *supra* note 25, at 715-19; Farmer, *Association Bargaining: Pennington and Jewel Tea Revisited*, 12 ANTITRUST BULL. 555, 558-63 (1967); Columbia Comment, *supra* note 25, at 756-57.

31. *See* St. Antoine, Connell: *Antitrust Law at the Expense of Labor Law*, 62 VA. L. REV. 603, 610-611 (1976); Note, *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 177-81 (1965).

32. This is also an interpretation of "predatory intent" under *Allen Bradley*. *See* Lewis v. Pennington, 400 F.2d 806, 814 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968); DiCola, *supra* note 25, at 719; Stanford Note, *supra* note 25, at 693-94. *See also* note 18 *supra*.

33. A mandantory subject of bargaining, however, "weighs heavily" in favor of a legitimate labor goal. Local 189, Amalagamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965) (White, J.).

set sometimes narrower[34] and sometimes broader[35] than mandatory subjects of collective bargaining. Justice White's opinion also fails to make clear what an "intimate relation" measures. Some commentators hold that the phrase connotes a test of the effects of an agreement[36] under which the exemption would be available only if the labor interests advanced by the agreement outweighed the actual injury to the competitive economy that the agreement causes.[37] Although Justice White alluded to such a balancing test in a footnote in *Jewel Tea*,[38] he apparently did not apply it.[39] An alternative argument is that "intimately related" measures the parties' subjective intention at the time of an agreement and that a reasonable belief in the legitimacy of the goal would satisfy the second test.[40]

---

34. *See* Note, *supra* note 25, at 702; California Comment, *supra* note 25, at 267-70. This is the issue addressed by Justice Goldberg in his opinion in the two cases. 381 U.S. at 699-700 (Goldberg, J., dissenting and concurring). *See* note 25 *supra*.

35. *See* Note, *supra* note 25, at 713. It has also been suggested that Justice White's test of legitimacy draws the line *at* mandatory subjects of bargaining. *See* Summers, *Labor Law in the Supreme Court: 1967 Term*, 75 YALE L.J. 59, 78 (1965).

36. *See*, Cox, *supra* note 25, at 326; Note, *Labor Law—Antitrust Liability of Labor Unions*—Connell Construction Co. v. Plumbers Local 100, 17 B.C. INDUS. & COM. L. REV. 217, 225 (1976).

37. *See* Willis, *In Defense of the Court: Accommodation of Conflicting National Policies, Labor and the Antitrust Laws*, 22 MERCER L. REV. 561, 574 (1971); American University Comment, *supra* note 27, at 979; Comment, *The Labor Antitrust Exemption: An Accommodation of Conflicting Congressional Policies, A Review After the* Connell *Decision*, 11 NEW ENGLAND L. REV. 643, 653 (1976). It has also been suggested that an ill-defined "intimately related" test and confusing conspiracy standards could result in such a balancing test being applied by the fact-finders regardless of their interpretation of "intimately related." *See* DiCola, *supra* note 25, at 725.

38. Justice White explained that the form of the agreement was not the essential concern, but rather that the interest of the union members be balanced against the relative impact on the product market. 381 U.S. at 690 n.5 (White, J.). It is not clear from Justice White's opinion whether this balancing would be used to determine if a subject was "intimately related" to a legitimate union goal, whether the balancing would comprise a separate test after a determination of "intimate" relation, or whether the balancing would be necessary at all upon a finding of "intimate" relation. *See* Cox, *supra* note 25, at 326; DiCola, *supra* note 25, at 721-23; Columbia Comment, *supra* note 25, at 757-58. For a later application of this test, see American Fed'n of Musicians v. Carroll, 391 U.S. 99, 107 (1968).

39. *See* Zimmer & Silberman, *supra* note 18, at 869; Columbia Comment, *supra* note 25, at 758-59. Justice White did, however, mention that the "apparent and real" effect on competition was outweighed by the "immediate and direct" concern of the union. 381 U.S. at 691 (White, J.).

40. Under such a test, the court would determine what the parties reasonably intended to accomplish with the agreement and then determine whether that goal was a legitimate union goal. *See* Cox, supra note 25, at 326; Note, *supra* note 25, at 711. The parties' legitimate intent would also appear to preclude a finding of "conspiracy." *See* note 31 *supra* and accompanying text.

Subsequent cases have applied both "conspiracy" and "intimately related" tests with little consistency.[41] When applying a conspiracy test for the non-statutory exemption,[42] courts generally have required that the conspiracy be demonstrated by anticompetitive purposes of the union,[43] and seemingly have ignored Justice White's requirement[44] that a union not restrain its own economic freedom.[45] When applying a test of intimate relation, most courts have found the labor interest legitimate if the agreement deals with a mandatory subject of bargaining[46] or is closely related to such subjects.[47] The cases vary as to whether "intimate relation" measures the effects[48] or the subjective intent[49] of an agreement.

The most recent Supreme Court decision concerning the labor antitrust exempton is *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100.*[50] The Court's discussion of

41. *See* DiCola, *supra* note 25, at 725.

42. *See, e.g.*, Iodice v. Calabrese, 512 F.2d 383, 390 (2d Cir. 1975); Webb v. Bladen, 480 F.2d 306, 308 (4th Cir. 1973); Lewis v. Pennington, 400 F.2d 806, 814 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968); Cedar Crest Hats, Inc. v. United Hatters, Cap & Millinery Workers, 362 F.2d 322, 326 (5th Cir. 1966).

43. *See, e.g.*, Embry-Riddle Aeronautical Univ. v. Ross Aviation, Inc., 504 F.2d 896, 903 (5th Cir. 1974); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 848 (3d Cir. 1974); South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 782 (6th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); Lewis v. Pennington, 400 F.2d 806, 814 (6th Cir.), *cert. denied*, 393 U.S. 983 (1968).

44. UMW v. Pennington, 381 U.S. 657, 668 (1965).

45. *See* DiCola, *supra* note 25, at 717. *See, e.g.*, Ramsey v. UMW, 416 F.2d 655 (6th Cir. 1969).

46. *See, e.g.*, Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970); Suburban Tile Center, Inc. v. Rockford Bldg. & Constr. Trades Council, 354 F.2d 1, 3 (7th Cir. 1965).

47. *See, e.g.*, American Fed'n of Musicians v. Carroll, 391 U.S. 99, 109 (1968) (price floor found to protect wage scale); Bodine Produce, Inc. v. United Farm Workers Organizing Comm., 494 F.2d 541, 557 (9th Cir. 1974) (union goal of recognition intimately related to wages, hours, and working conditions); National Dairy Prods. Corp. v. Milk Drivers & Dairy Employees Local 680, 308 F. Supp. 982, 986 (S.D.N.Y. 1970) (restriction on operation of plant outside union local's area was a method of preserving wage scale).

48. *See* American Fed'n of Musicians v. Carroll, 391 U.S. 99, 109 (1968). In general, however, balancing of anticompetitive effect is not required. *See* DiCola *supra* note 25, at 753. *See, e.g.*, Intercontinental Container Transp. Corp. v. New York Shipping Ass'n, 426 F.2d 884, 887 (2d Cir. 1970); National Dairy Prods. Corp. v. Milk Drivers & Dairy Employees Local 680, 308 F. Supp. 982, 986 (S.D.N.Y. 1970).

49. *See* Great Atl. & Pac. Tea Co. v. Amalgamated Meat Cutters Local 88, 410 F.2d 650 (8th Cir. 1969) (per curiam) (union prohibition on sale of meat not cut and packaged by its members remanded on question of motivation).

50. 421 U.S. 616 (1975). A union coerced a general contractor, with which it had no collective bargaining agreement, to sign an agreement limiting its subcontracting to those firms with which the local had a current contract. The Court held that neither the statutory nor the non-statutory exemptions were available to the union. The Court denied the statutory exemption to the union

the non-statutory exemption,[51] although merely dictum, is nevertheless significant. The Court apparently eliminated the conspiracy test for the applicability of the non-statutory exemption.[52] Moreover, in examining the agreement's relationship to legitimate labor goals, the Court placed emphasis on the actual and potential effects of the agreement,[53] and thus seemed to apply the balancing test alluded to by Justice White in a footnote in *Jewel Tea*.[54] It remains unclear what impact the Court's discussion of the non-statutory exemption should have, given the inapplicability of the discussion to the facts of the case. The *Connell* decision itself leaves open the question of what protection a collective bargaining relationship would offer to an agreement with a restraint of the magnitude of that in *Connell*.[55] In a collective bargaining context, lower courts could conceivably ignore *Connell*, treat it as precedent, or merely use it as a guide in their decisions. In practice, lower courts appear to have followed the first two options.

In determining the availability of the labor antitrust exemption, some courts have ignored *Connell* and have continued

---

because of "concerted action or agreements." *Id.* at 622. The Court, however, failed to make clear what constituted the concerted action or agreement.

Some commentators have argued that *Connell* may have abandoned the *Hutcheson* and *Allen Bradley* doctrines that allowed unilateral action by a union in its self-interest. *See* American University Comment, *supra* note 27, at 995-98; Comment, *Supreme Court Holds that Labor Unions are not Exempt from Antitrust Statutes*, 44 FORDHAM L. REV. 191, 199 (1975) [hereinafter cited as Fordham Comment]; Comment, *Agreement Between Union and "Stranger" Building Contractor Obligating Contractor to Subcontract only with Parties to Union's Collective Bargaining Agreements is not Exempt from the Sherman Act*, 28 VAND. L. REV. 1337, 1347 (1975) [hereinafter cited as Vanderbilt Comment].

51. 421 U.S. at 622-26.

52. *See* Note, *supra* note 36, at 224; American University Comment, *supra* note 27, at 995; Vanderbilt Comment, *supra* note 50, at 1347; Comment, *Labor Union Subject to Antitrust Liability as Well as Unfair Labor Practice Remedies when its Unlawful Activity Directly Affects the Marketplace*, 1976 WIS. L. REV. 271, 282.

53. 421 U.S. at 625. Although the union had a legitimate labor interest of organization, the method chosen to forward it was not legitimate. The subcontracting clause did not fall within the construction industry exception to the "hot cargo" prohibitions of § 8(e) of the NLRA, and thus was without that exception's protections. *Connell* therefore may impose an additional requirement of methodological legality. *See* Moeller, *supra* note 16, at 730; Fordham Comment, *supra* note 50, at 199.

54. *See* note 38 *supra* and accompanying text. It has been argued that the balancing test was misapplied in *Connell* by over emphasizing the anitcompetitive effects of the agreement and virtually ignoring the legitimate union interest. *See* Moeller, *supra* note 16, at 730-31; American University Comment, *supra* note 27, at 997 & n.140; Comment, *supra* note 28, at 993.

55. 421 U.S. at 625-26.

to look at the intent of the collective bargaining parties, attempting to determine whether the parties sought to further legitimate labor goals or to damage competitors of the negotiating employer.[56] Other courts have paralleled the analysis in *Connell* by applying an effects test, examining whether the agreement actually furthered legitimate labor goals and whether it resulted in injury to the competitive economy.[57]

In *Consolidated Express*, the Third Circuit held that the existing non-statutory exemption was not applicable to the collective bargaining agreement between the ILA and the NYSA.[58] The court separated the *Pennington* and *Jewel Tea* decisions, and then relied on the latter—as it was interpreted in *Connell*[59]—to formulate two requirements for the availability of the non-statutory exemption: "first, that the market restraint advance a legitimate labor goal, and, second, that the agreement restrain trade no more than is necessary to achieve that goal."[60] The Rules on Containers and the subsequent enforcement of the Rules did not meet the first requirement, both because the agreement did not advance a mandatory subject of collective bargaining[61] and, more importantly, because the finding of labor law violations "preclude[d] recognition of complete non-statutory antitrust immunity."[62]

---

56. *See, e.g.*, California Dump Truck Owners Ass'n v. Associated Gen. Contractors, 562 F.2d 607, 611-14 (9th Cir. 1977); Frito-Lay, Inc. v. Retail Clerks Local No. 7, 452 F. Supp. 1381, 1384 (D. Colo. 1978); Signatory Negotiating Comm. v. Local 9, Int'l Union of Operating Eng'rs, 447 F. Supp. 1384, 1390 (D. Colo. 1978); Consolidated Express, Inc. v. New York Shipping Ass'n, 452 F. Supp. 1024, 1041 (D.N.J. 1977).

57. *See, e.g.*, Mackey v. National Football League, 543 F.2d 606, 614-16 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); Barabas v. Prudential Lines, Inc., 451 F. Supp. 765, 770-71 (S.D.N.Y.), *aff'd*, 577 F.2d 184 (2d Cir. 1978). *See also* Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n, 579 F.2d 484, 502-05 (9th Cir. 1978) (Hufstedler, J., concurring and dissenting), *cert. denied*, 439 U.S. 1089 (1979).

58. *See* text accompanying note 13 *supra*. The court was ruling on a denial of summary judgment on the antitrust liability question. Because the anticompetitive impact of the agreement was "significant and uncontested," 602 F.2d at 518, defendants needed the exemption to escape liability.

59. The court recognized that *Connell* was not controlling precedent because it did not deal with a collective bargaining relationship, but reasoned that its mode of analysis was similar to that in *Jewel Tea*. *Id.* at 517.

60. *Id.* at 517-18.

61. *Id.* at 518.

62. *Id.* Thus, if a plaintiff who has sustained a business or property injury can show that the pertinent agreement is illegal under federal labor law, the existing non-statutory labor antitrust exemption does not apply. The Court did not apply its second requirement that the agreement "restrain trade no more than is necessary," presumably because the union's goal was not "legitimate." The exact meaning of this second requirement is thus not clear. *See* notes 78-80 *infra* and accompanying text.

The court, however, remained concerned that the exemption protect not only lawful labor agreements, but also the collective bargaining process. Antitrust injunctive relief[63] does not threaten this process and thus the court's narrow formulation of the existing non-statutory exemption could apply without difficulty in antitrust injunction actions.[64] The threat of an action for treble damages, on the other hand, may discourage parties to collective bargaining from reaching agreement on topics that have not been conclusively catagorized as mandatory subjects of bargaining under labor law.[65] If parties agree on such a subject and the agreement is found to violate labor law, the existing antitrust exemption will not protect the parties from antitrust liability, given the preclusive effect of a labor law violation under *Consolidated Express*.[66] The court, however, concluded that treble damages deterred improper activity only if the parties to an agreement could reasonably foresee that the agreement was illegal. Thus, the court created a new exemption applicable when antitrust treble damages are sought for conduct already found to be a labor violation. Defendants can rebut the prima facie case that the labor antitrust exemption does not apply[67] if they can show (1) that during collective bargaining they could not reasonably foresee that the subject matter of their agreement was unlawful under labor law (an objective standard of intent), and (2) that the agreement was intimately related to an object of collective bargaining thought at the time to be legitimate and went no further in imposing restraints than was reasonably necessary.[68]

63. Injunctive relief is provided by § 16 of the Clayton Act. 15 U.S.C. § 26 (1976).

64. 602 F.2d at 518.

65. The problem is simply whether a topic has been categorized as a mandatory subject of bargaining (which is protected from labor proscriptions), or as merely permissible. An agreement on a permissible topic can be a labor law violation. *See* note 21 *supra*.

66. The non-statutory exemption applies equally to employers and unions. *See* Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 729-30 (1965) (Goldberg, J., dissenting and concurring); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 847 n.14 (3d Cir. 1974); Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc., 351 F. Supp. 462, 498-500 (E.D. Pa. 1972); Comment, *Employer's Mutual Aid: No Antitrust Laws Need Apply and Almost All's Fair in Industrial War*, 44 FORDHAM L. REV. 1145, 1160 (1976). Although §§ 8(b)(4) and 8(e) of the NLRA provide an incentive to unions to resist secondary activity, they do not provide this incentive to employers because the sections do not apply to employers.

67. *See* note 62 *supra* and accompanying text.

68. 602 F.2d at 521. This test differs from that used in an action for injunctive relief; under the latter test, a belief that the agreement is legal under labor law will afford no protection. *See* text accompanying notes 76, 87 *infra*.

The *Consolidated Express* court, in formulating the existing non-statutory labor antitrust exemption, did not focus its analysis on the subjective intent of the parties, but instead focused on the actual effects of the agreement. The requirement that the market restraint imposed by a collective bargaining agreement "advance a legitimate labor goal" may appear, at first glance, quite traditional.[69] The court, however, limited such goals to mandatory subjects of collective bargaining.[70] A mandatory-nonmandatory test for legitimacy, although easy for courts to apply,[71] was not required by precedent[72] and may in fact generate long-range difficulties.[73] Of potentially more widespread impact than the restriction of legitimate labor goals to mandatory subjects of bargaining, however, is the requirement under *Consolidated Express* that legitimate labor interests be *advanced*. This standard, unlike the "intimately related" test enunciated by *Jewel Tea*,[74] appears to require an

69. The "legitimate labor goal" idea is taken directly from *Jewel Tea*. *See* note 25 *supra*. This requirement has as its source § 6 of the Clayton Act. *See* note 17 *supra*.

70. The court reasoned that "a finding that the Rules were not a mandatory subject of bargaining effectively undercuts any contention that they so 'fall within the protection of the national labor policy.' " 602 F.2d at 518.

71. This test is often applied by lower courts. *See* notes 46-47 *supra* and accompanying text.

72. In *Jewel Tea*, neither Justice White nor Justice Goldberg limited legitimate labor goals in this way. Justice White did not mention a specific test for legitimate goals, stating only that a mandatory subject "weighs heavily" in favor of an exemption. Justice Goldberg's reference to mandatory subjects was a reaction to the possibility that, under Justice White's opinion, even agreements dealing with mandatory subjects of bargaining could be subject to antitrust liability. His reference is therefore not a limitation of the exemption, but an expansion. This is clearly seen in Justice Goldberg's broad definition of mandatory subjects, which arguably included everything but the most blatant of market restraints. *See* note 25 *supra*.

73. The mandatory-nonmandatory distinction is strained even under labor law. Note, *supra* note 25, at 690-91. The strain results from the problem of classifying these subjects. A nonmandatory (permissive) subject of bargaining may be negotiated, but is not protected from labor proscriptions. To apply this distinction to antitrust law forces the NLRB into the position of determining antitrust liability, and therefore reaches too far. *See* Zimmer & Silberman, *supra* note 18, at 883-84. In *Consolidated Express*, the NLRB's determination that the Rules on Containers did not concern work preservation—a mandatory subject of bargaining—determined the antitrust liability of the parties to this agreement. This determination regarding the Rules, however, has not been made with any degree of consistency. *See* note 21 *supra*.

An additional problem with a mandatory-nonmandatory distinction is that determinations of mandatory subjects of bargaining are likely to become fixed for all time, a result that will stifle collective bargaining by effectively undercutting the flexibility of the NLRB. Rubenstein, *The Emerging Antitrust Implications of Mandatory Bargaining*, 50 MARQ. L. REV. 50, 76 (1966).

74. *See* notes 33-40 *supra* and accompanying text.

after-the-fact determination of the effects of the agreement. Instead of measuring what the collective bargaining agreement was intended to accomplish, the term "advance" focuses on what the agreement *has* accomplished.[75] This change of focus from the parties' intentions to what the agreement accomplishes narrows the exemption and creates uncertainty at the bargaining table as to the propriety of the agreement.[76] Again, the precedential support for this requirement is unclear.[77]

The second requirement of the *Consolidated Express* test, that the agreement "restrain trade no more than is necessary," is an even more unusual requirement in the labor-antitrust exemption case law.[78] Under this test, in addition to "advancing" a legitimate goal, the collective bargaining parties must adopt the narrowest possible means of achieving that goal. This "least restrictive means" approach requires not only an examination of the severity of the market restraint, but also an after-the-fact determination of the wisdom of the union's choice of methods.[79] Although the Third Circuit claimed precedential support for this approach from both *Connell* and *Jewel Tea*, the approach was not followed in either decision.[80]

---

75. The court may have been following a suggestion in *Connell* that the methods employed by a union be legal in order to preserve an exemption. Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 625 (1975). *See* note 53 *supra* and accompanying text. That suggestion requires a similar after-the-fact determination.

76. *See* notes 103-05 *infra* and accompanying text.

77. It is not clear if Justice White's "intimately related" standard in *Jewel Tea* is an intent or an effect requirement. *See* notes 36-49 *supra* and accompanying text.

78. This *is* a concept which has appeared in antitrust law. *See* note 108 *infra*.

79. Courts, in assessing the wisdom of a union's objectives or methods, are forced to rely on their own social, economic, and political philosophies. *See* Moeller, *supra* note 16, at 730. This forced reliance implies that courts are better able to decide the "proper" union methods and goals than are union leaders. *See* Zimmer & Silberman, *supra* note 18, at 880-83. This assessment is something for which courts have long been criticized. *See* Local 189, Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 697 (1965) (Goldberg, J., dissenting and concurring); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 485 (1921) (Brandeis, J., dissenting); Cox, *supra* note 25, at 326; Summers, *supra* note 35, at 78; Columbia Comment, *supra* note 25, at 745. This form of second-guessing has also been criticized when used in a business context. *See* American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249-50 (3d Cir. 1975).

80. Although *Jewel Tea* relies heavily on the district court's finding that the terms of the agreement were not feasible, 381 U.S. at 694, it includes no discussion of available, less restrictive means. *See* St. Antoine, *supra* note 31, at 615; American University Comment, *supra* note 27, at 980 n.62. *Connell* may have been based on the restrictiveness of the agreement, but again, the opinion includes no discussion of less restrictive alternatives. *See* American University Comment, *supra* note 27, at 997. Some commentators point to *Allen Bradley*,

The Third Circuit further demonstrated its move away from an intent-based application of the non-statutory exemption by explicitly rejecting the *Pennington* analysis and thus eliminating the traditional lack of conspiracy requirement.[81] In rejecting this requirement the court improperly relied on the *Jewel Tea* and *Connell* decisions. Although it has been argued that *Connell* eliminated the lack of conspiracy requirement from the exemption,[82] *Connell* was not decided in the context of collective bargaining and is therefore not directly applicable to the non-statutory exemption.[83] Moreover, the propriety of the court's separation of *Jewel Tea* from *Pennington*, decisions issued by the same Court on the same day, is dubious.[84]

After defining the existing non-statutory exemption, the Third Circuit concluded that the exemption was inapplicable in *Consolidated Express* because "an NLRB finding of an unfair labor practice precludes recognition of complete non-statutory antitrust immunity."[85] Thus, the NLRB's determination that

---

see note 18 *supra*, as the source of the "least restrictive means" requirement. *See* St. Antoine, *supra* note 31, at 622; Note, *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 1, 240 (1975). One commentator has read *Jewel Tea* to require the least restrictive means. *See* American University Comment, *supra* note 27, at 979 n.58. Apparently, the least restrictive means requirement was not followed in *Consolidated Express*, perhaps because the court considered it unnecessary upon finding that the union's goals were "illegitimate."

81. *See* notes 18, 25, 28-32 *supra* and accompanying text.

82. *See* note 52 *supra* and accompanying text.

83. The court recognizes that *Connell* does not apply and yet proceeds to apply its analysis. 602 F.2d at 517.

84. It is clear that these cases must be interpreted together; the *Pennington* notion of "conspiracy" continues to be important in the non-statutory exempton analysis. *See* notes 55-56 *supra* and accompanying text.

85. 602 F.2d at 518. The court relied on "well reasoned decisions in other circuits" that had argued that the national labor policy extends its protection only so far as is legal under the labor laws. *See* Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n, 579 F.2d 484, 503 (9th Cir. 1978) (Hufstedler, J., concurring and dissenting), *cert. denied*, 439 U.S. 1089 (1979); Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793, 803-04 (2d Cir.) (Lumbard, J., concurring and dissenting), *cert. denied*, 434 U.S. 923 (1977); Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n, 483 F.2d 384, 402 (3d Cir. 1973), *modified*, 494 F.2d 1353 (3d Cir. 1974). It is not clear from the court's opinion which unfair labor practices result in automatic loss of exemption. The court referred specifically to § 8(e) of the NLRA, stating that when only injunctive relief is sought, "a finding that an agreement violates section 8(e) should always remove the antitrust exemption," 602 F.2d 519, but the court also referred generally to unfair labor practices, which would encompass all of § 8. Most likely the court intended to preclude immunity only on violation of § 8(e), as the section is mentioned frequently and involves agreements that presumably could constitute the neces-

the Rules did not concern a mandatory subject of bargaining[86] and that they violated sections 8(b)(4) and 8(e) of the NLRA, became, in effect, a decision that the existing antitrust exemption was unavailable. Such automatic preclusion of the exemption on a finding of labor law violation focuses not on the intent of the parties to the collective bargaining agreement, but rather on the results of the agreement. Again, the Third Circuit lacked strong precedential support for its approach;[87] the court itself has, since *Consolidated Express*, questioned the preclusive effect of a labor law violation.[88]

Consolidated Express has thus both implicitly, by its formulation of the non-statutory exemption and its preclusion rule, and explicitly, by its rejection of the *Pennington* conspiracy line of cases,[89] rejected any kind of an intent test for determining if an antitrust exemption is available to collective bargaining parties. Although the court took note of its rejection of *Pennington*, it failed to acknowledge that it had focused primarily on the effects of the parties' agreement. A possible explanation for the shift to an effects test lies in the difficulties posed by a subjective intent standard. Subjective intent, a "slippery" evidentiary issue,[90] allows judges much leeway to

---

sary combination under antitrust law. Violations of § 8(b), on the other hand, involve unilateral union action.

It should be noted that even without an unfair labor practice finding, the conduct involved in *Consolidated Express* would not qualify for the non-statutory exemption under the court's opinion. *See* note 120 *infra* and accompanying text.

86. *See* notes 10, 21, 73 *supra* and accompanying text.

87. The court relied chiefly on dissenting and concurring opinions, *see* Ackerman-Chillingworth v. Pacific Electrical Contractors Ass'n, 579 F.2d 484, 503 (9th Cir. 1978) (Hufstedler, J., concurring and dissenting), *cert. denied*, 439 U.S. 1089 (1979); Commerce Tankers Corp. v. National Maritime Union, 553 F.2d 793, 803 (2d Cir.) (Lumbard, J., concurring and dissenting), *cert. denied*, 434 U.S. 923 (1977), and on cases that do not directly address the preclusive effect of a labor law violation on the availability of the exemption. *See* Mackey v. National Football League, 543 U.S. 606, 614 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). The court ignored other decisions of lower courts that had reached the opposite result. *See, e.g.*, Frito-Lay, Inc. v. Retail Clerks Local 7, 452 F. Supp. 1381, 1384 (D. Colo. 1978); National Dairy Prods. Corp. v. Milk Drivers & Dairy Employees Local 680, 308 F. Supp. 982, 987 (S.D.N.Y. 1970).

88. *See* Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council, 609 F.2d 1368, 1375 (3d Cir. 1979). In that case, the Third Circuit stated: "The fact that in *Connell* Justice Powell considered the actual and potential anticompetitive effects of the agreement independently of the § 8(e) issue suggests that the presence of a § 8(e) violation may not itself decide the exemption issue. . . . We therefore . . . do not rule on the effect of a § 8(e) violation standing alone." *Id.*

89. 602 F.2d at 516. *See* notes 81-84 *supra* and accompanying text.

90. DiCola, *supra* note 25, at 715; *see* Meltzer, *supra* note 19, at 722; St. Antoine, *supra* note 31, at 609; Note, *supra* note 25, at 686.

speculate on a union's objectives and methods.[91] Furthermore, because subjective intent is difficult to prove, it may be easily manipulated by parties to collective bargaining.[92]

A focus on effects, however, runs counter to the policy of the labor antitrust exemption to balance the concern of antitrust law—the preservation of a competitive economy—with that of labor law—the regulation of the struggle for power between unions and employers in which unions seek to achieve a monopoly over the labor supply.[93] Because free competition does not adequately regulate the allocation of resources in the labor market, collective bargaining is relied upon "to redress the inequality of position and power of employer and employee."[94] To that same end, the labor antitrust exemption is intended to protect both specific union activities[95] and the process of collective bargaining itself.[96]

Hinging the applicability of the labor antitrust exemption on the actual effects of a collective bargaining agreement impairs the process of collective bargaining. It is essential to recognize the difference between business agreements that result in a restraint of trade and collective bargaining agreements that have a similar result. Antitrust law demonstrates that in a business context it is proper to infer an anticompetitive intent from the anticompetitive effects of the parties' actions.[97] Such an inference is justified because business behavior is "normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits and risks."[98] Moreover, an emphasis on the effects of parties' actions, together with the lack of detail in the antitrust law,[99] leads to uncertainty for business entities at the time of any action.[100] This uncertainty is useful as a regulatory tool[101] because it discourages business

91. *See generally* note 79 *supra*.

92. This may be the concern expressed in Justice Douglas' opinions in *Pennington* and *Jewel Tea*. *See* note 25 *supra*.

93. *See* Winter, *supra* note 16, at 66-67.

94. Kirkpatrick, *Crossroads of Antitrust and Union Power*, 34 GEO. WASH. L. REV. 288, 292 (1965).

95. Primary strikes, picketing, and boycotts are allowed.

96. 29 U.S.C. § 151 (1976), *quoted in* note 20 *supra*.

97. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 621-23 (1953); Comment, *Broadening Labor's Antitrust Liability While Narrowing its Construction Industry Proviso*, 27 CATH. U.L. REV. 305, 329-30 (1975); Note, *supra* note 25, at 686.

98. United States v. United States Gypsum Co., 438 U.S. 422, 444 (1978).

99. *See* Rubenstein, *supra* note 73, at 51-53.

100. *See id.* at 53-54.

101. *See* Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation*, 56 CORNELL L. REV. 409, 429 (1971).

entities from forming combinations and encourages such entities to use ingenuity in their actions, short of destroying or frustrating meaningful competition.[102] A collective bargaining process, on the other hand, lacks the clarity of business actions,[103] and an inference of anticompetitive intent from the effects of a labor agreement is therefore less justified.[104] Moreover, the uncertainty that results from use of an "effects" test has disastrous results in the context of collective bargaining.[105] The negotiation process must be protected[106] in order to encourage unions and employers to settle disputes.[107] Without certainty, parties to collective bargaining are discouraged from negotiating, and the process is frustrated.

The court in *Consolidated Express*, by rejecting an intent analysis and adopting an effects test for the non-statutory exemption, has in effect eliminated the exemption. The operation of the exemption as it is formulated by the Third Circuit appears to require an antitrust "rule of reason" analysis for collective bargaining agreements.[108] The court itself recognized this practical effect when it applied a per se standard of anti-

102. "Although businessmen in general bemoan the administration of the antitrust laws for this reason, it may very well be that this seemingly 'unprincipled' approach to the public regulation of business holds within it one of the conditions precedent for the flourishing of a dynamic business society." Rubenstein, *supra* note 73, at 54 (footnote omitted).

103. *See* Note, *supra* note 25, at 697.

104. All actions of labor unions could be viewed as yielding anticompetitive product market effects. A common example is the effect that union wage demands have on the ultimate product price. It is clear that such wage demands do not, in every case, indicate an attempt at product market control. *See* DiCola, *supra* note 25, at 715; Note, *supra* note 31, at 180; Note, *supra* note 25, at 697-98.

105. *See* Note, *supra* note 25, at 694.

106. 29 U.S.C. § 151 (1976), *quoted in* note 20 *supra*.

107. The chief area of dispute is the problem of technological change. To submit an agreement dealing with such change to an after-the-fact determination of its legality or legitimacy under labor law using antitrust sanctions—or even to a determination of its "mandatoriness" using labor remedies—could restrict collective bargaining and encourage a union to resist any technological innovation. *See*, Comment, *supra* note 21, at 825. Such a determination is particularly unjust "where the asserted 'illegality' is in the periodically altered and sometimes abstruse field of unfair labor practices." National Dairy Prods. Corp. v. Milk Drivers & Dairy Employees Local 680, 308 F. Supp. 982, 987 (S.D.N.Y. 1970).

108. This has already been observed of the non-statutory exemption. Comment, *supra* note 66, at 1160. *See* M. HANDLER, *supra* note 15, at 239-40; Farmer, *supra* note 30, at 559; Comment, *supra* note 97, at 331-34. Even the court's adoption of a "less restrictive means" requirement, *see* notes 78-80 *supra* and accompanying text, reflects an antitrust analysis since this is a concept used in antitrust law. *See* American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1249 (3d Cir. 1975).

trust illegality to agreements that had failed to qualify for the exemption, stating that an "application of the rule of reason [would be] redundant."[109] A collective bargaining agreement thus is afforded no more protection than a business action:[110] any agreement with too much anticompetitive effect is subject to antitrust liability.

The court in *Consolidated Express* implicitly recognized the problems with its formulation of the existing collective bargaining exemption. Faced with a collective bargaining agreement that involved an area of labor law plagued with uncertainty,[111] but that did not qualify under the court's effect-oriented analysis of the existing exemption because of the NLRB finding that it violated labor law, the Third Circuit created a limited new exemption to protect more adequately the process of collective bargaining.

The first element of the new exemption provides an objective test of the parties' intent during collective bargaining. Such a test—that of reasonable foreseeability—is easy to apply and avoids the practical problems associated with previous intent standards.[112] It allows parties to bargain in good faith and yet places some limits on collective bargaining negotiations. Moreover, the additional requirements that the agreement be intimately related to a legitimate labor goal and be no broader than is necessary to achieve that goal are both measured at the time of the agreement. These requirements limit the exemption without subjecting parties to the agreement to the difficulties of a pure effects test.[113]

---

109. 602 F.2d at 523. The dissent in *Consolidated Express* takes exception to this per se application, *id.* at 527-29 (Weis, J., dissenting), as do most commentators, fearing "immeasurable harm to the system of collective bargaining." Comment, *supra* note 97, at 330. *See* M. HANDLER, *supra* note 15, at 239-40; St. Antoine, *supra* note 31, at 609-10; Note, *supra* note 25, at 713. *But see* Siegel, Connolly, & Walker, *supra* note 26, at 474.

110. Exempting a collective bargaining agreement only upon proof that the agreement incorporated the least restrictive means to reach the legitimate goal provides little protection because such a finding will exempt even a business combination that otherwise would result in a per se antitrust violation. The availability of a less restrictive means may even be a factor in determining whether a restraint should be per se unlawful. *See* White Motor Co. v. United States, 372 U.S. 253, 270-72 (1963) (Brennan, J., concurring); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 51 (9th Cir. 1971); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 557 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

111. *See* note 107 *supra*. Specifically, the agreement involved the classification of work reacquisition attempts. *See* note 21 *supra*.

112. *See* notes 90-92 *supra* and accompanying text.

113. *See* notes 97-110 *supra* and accompanying text. A problem with these two latter elements concerns the proper time of the measurement. Although it is essential that both elements be measured at the time of the agreement to

Although the new exemption correctly focuses on intent and creatively presents a workable standard to measure intent, the exemption nevertheless fails to fulfill the court's self-proclaimed goal—to protect the process of collective bargaining.[114] In both its formulation of the existing non-statutory exemption[115] and its preclusion of antitrust immunity on the finding of a labor law violation,[116] the Third Circuit effectively discourages collective bargaining.[117] The new exemption simply does not go far enough toward offsetting the early restrictiveness of the opinion. The new exemption is self-limiting, available only upon a finding of a labor law violation.[118] Yet, the reason for creating the exemption—protection of the collective bargaining process—seems applicable regardless of whether there is a labor violation.[119] Moreover, even if most situations warranting exemption involve a labor law violation,[120] plaintiffs injured by collective bargaining actions may be encouraged not to allege such violations so that the new antitrust exemption will not be available to the defendants.[121] Without the finding of a labor law violation, defendants cannot take advantage of the new ex-

---

discern the parties' intent, many courts may fail to do so, reducing the test to one of effects.

114. *See* 602 F.2d at 520.

115. *See* notes 60, 69-84 *supra* and accompanying text.

116. *See* notes 60-62, 85-88 *supra* and accompanying text.

117. *See* notes 93-110 *supra* and accompanying text.

118. The Third Circuit appears to have created the new exemption solely in an effort to forestall problems that might result from the application of its ruling that a finding of labor law violation precludes application of the existing collective bargaining exemption. The court seems unaware that collective bargaining will be chilled even when the existing effect-oriented exemption is applied.

119. The court could be concerned with the availability of remedies to an injured plaintiff. If a violation of labor law was found, both compensatory, 29 U.S.C. § 187 (1976), and injunctive relief, 29 U.S.C. § 160(1) (1976), would be available under labor law even if the new antitrust exemption applied. If, however, no violation was found, a plaintiff would be without relief if the new exemption applied.

120. Conduct may be found to be nonmandatory and to lack the secondary effects necessary to be found an unfair labor practice, *see* note 19 *supra*, but still have anticompetitive effects on the economy. *See* notes 104 *supra* and 124 *infra*. Or, conduct may in fact violate labor law, but not be ruled violative by the NLRB if plaintiffs have not so alleged. The major cases dealing with the non-statutory exemption appear to involve labor law violations. *Connell*, as discussed by the Supreme Court, involved a violation of § 8(e) of the NLRA, 421 U.S. at 626-35, and very possibly a violation of § 8(b)(4) of the Act. Both *Pennington* and *Jewel Tea* appear "well within the reach of the National Labor Relations Act." Summers, *supra* note 35, at 81.

121. Although this denies them the preclusive effect of such a violation, plaintiffs do not thereby bear a heavier burden since a case must initially be established, whether under labor or antitrust law.

emption, and may be placed in the anomalous situation of raising their own labor law violation as a defense to an antitrust action. The other limitation on the availability of the new exemption is that the action must be one for treble damages. The merit of precluding the availability of the exemption in actions seeking injunctive relief is both questionable and problematic.[122] On the whole, the limitations of the new exemption severely impede its ability to protect collective bargaining.

In summary, the *Consolidated Express* opinion is contradictory. Most confusing are the opinion's internal contradictions: although the Third Circuit professes concern toward the collective bargaining process by its creation of the new exemption, both the court's interpretation of the non-statutory exemption and its finding that a labor law violation precludes recognition of antitrust immunity tend to discourage that process. This decision is thus not helpful to the collective bargaining process, and is in addition inconsistent with both labor and antitrust precedent.

The legitimate concerns of the court may best be dealt with

122. The court reasoned that the availability of treble damages is harsh on the collective bargaining process and serves little use following a finding of labor law violation. The court focused on the antitrust policy of deterrence, arguing that this goal would not be served if parties to a collective bargaining agreement could not foresee the application of antitrust sanctions to their agreement. 602 F.2d at 520-21. Although this argument may be true, it fails to appreciate the general deterrence goal of treble damages—deterrence not of parties to *this* agreement, but deterrence of parties to *future* agreements. Further, the possibility of receiving treble damages encourages private actions, the "bulwark of antitrust enforcement." Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968). The possibility of receiving single damages, however, as are available under labor law, *see* note 11 *supra*, perhaps does not provide this encouragement. Moreover, single damages may be insufficient either to cover the costs of private enforcement or to deter profitable illegal activity.

The distinction between treble damages and injunctive relief may frustrate a clearly defined Congressional limitation on injunctions in the labor context. In the early history of the Sherman Act, injunctions were often sought by employers to frustrate any action by the union. *See* Allen Bradley Co. v. Local 3, IBEW, 325 U.S. 797, 802 (1945); United States v. Hutcheson, 312 U.S. 219, 235-36 (1941); FRANKFURTER & GREENE, THE LABOR INJUNCTION 17-24 (1930). Congress reacted by prohibiting such injunctions, *see* note 17 *supra*, and today private actions for injunctive relief are not allowed. Perhaps, then, in the labor context, treble damages are not harsher than injunctive relief and do not warrant being distinguished.

Finally, such a distinction may prove meaningless in most situations when, as in *Consolidated Express*, the conduct objected to has already been enjoined under labor law. *See* note 10 *supra*. Plaintiffs in *Consolidated Express* were clearly seeking treble damages, not further injunctive relief. As the new exemption requires a labor law violation to be triggered, a section 10(*l*) injunction will in most cases already have been issued.

by a single intent-focused collective bargaining exemption. The court's formulation of the "old" non-statutory exemption and its preclusion rule, both of which discourage the process of collective bargaining, should be abandoned. Neither are mandated by precedent[123] and their concerns—problems of proof with an intent test and the danger that parties to collective bargaining may circumvent everything but an effects test—can be alleviated by less drastic alternatives. A modified version of the new exemption should be adopted for all collective bargaining agreements that are scrutinized under antitrust law.

The modified collective bargaining exemption should require defendants to show that they reasonably believed that their collective bargaining agreement, and the steps taken to implement it, were intimately related to a legitimate labor goal.[124] This requirement, it has been argued, was forwarded by Justice White in his opinion in *Jewel Tea*,[125] but even without such support the requirement appears sound. The modified exemption would retain an objective intent standard in order to avoid the chilling effect that an "effects" test might have on collective bargaining,[126] ensure that parties to collective bargaining pursue legitimate goals, and avoid difficult proof problems[127]

This test alone, however, may be susceptible to manipulation by parties who couch their agreements in legitimate labor terms while masking an ultimate aim of product market control.[128] Therefore, parties to collective bargaining should lose their exemption if the plaintiff can show that the defendant joined in an agreement with the knowledge that it was to be

123. *See* notes 69-88 *supra* and accompanying text.

124. Mandatory subjects of bargaining should be used as a guide in determining the legitimacy of a labor goal, but courts should be free to exempt agreements dealing with permissive subjects of bargaining. For example, a union's request to place one of its members on the board of directors of an employer most likely would be a permissive subject of bargaining. *See* note 72 *supra*. If it is bargained over and agreed to by the union and the employer, it is doubtful that such a provision would be found violative of antitrust law as creating an interlocking directorate. *See generally* 15 U.S.C. § 19 (1976). The addition of the "intimately related" element should give courts this flexibility.

This test differs from both the old and new exemptions under *Consolidated Express*. The above example under the old exemption would not be immune from antitrust liability since it is not a mandatory subject of bargaining. It also would not qualify under the new exemption because a labor law violation is not involved.

125. *See* note 40 *supra* and accompanying text.

126. *See* notes 104-07 *supra* and accompanying text.

127. *See* notes 90-92 *supra* and accompanying text.

128. The *Allen Bradley* and *Pennington* allegations illustrate this problem. *See* notes 18, 25 *supra*.

used for product market control.[129] Although this extra safeguard may cause problems of proof,[130] the alternatives are more undesirable.[131] The collective bargaining agreement in *Consolidated Express* could qualify under this modified exemption if the parties to the agreement reasonably believed, in light of the uncertainty in the law,[132] that the Rules were legitimate, and if there was a lack of proof that the employers involved were using this agreement for market control.[133]

The modified collective bargaining exemption, using an objective standard of intent, would provide an easy test to administer, give primary consideration to labor goals, and apply to all but manipulative behavior. If manipulation occurred, proof of knowing union participation in a scheme for product market control would subject such collective bargaining agreements to antitrust scrutiny. This modified exemption would avoid the chilling effect on collective bargaining that results from use of a test that assesses the effects of labor agreements, and yet would ensure that parties to an agreement focus on legitimate labor goals. Most important, such an exemption would furnish

129. *See* Farmer, *supra* note 30, at 563. This avoids the problems of interpretation of the *Pennington* conspiracy test, *see* notes 28-32 *supra* and accompanying text, and makes it clear that collective bargaining alone is not sufficient to subject an agreement with product market effects to antitrust scrutiny. In other words, the standard to be used is that of Justice White (i.e., requiring additional evidence) and not of Justice Douglas (inferring bad intent from the agreement) in *Pennington*. *See* note 25 *supra*.

130. *See* notes 90-92 *supra* and accompanying text.

131. It is possible to use an objective measure under the "least restrictive means" test, *see* notes 78-80 *supra* and accompanying text, but even an objective measure would pose difficult line-drawing problems for judges and juries and could degenerate to an effects test. *See* note 113 *supra*. It is not suggested that the proposed exemption resolves all problems in this area. Even focused on legitimate labor goals and absent any employer intent of product market control, collective bargaining agreements may pose serious product market effects. The only response can be that choices must be made between market restraints and the free functioning of collective bargaining.

It should be noted that under the proposed exemption, both the *Pennington* and *Jewel Tea* cases, *see* notes 23-49 *supra* and accompanying text, could be decided with the same results.

132. *See* note 21 *supra*. Defendants would have to prove that they actually believed in the legitimacy of the Rules. The court would have to find such a belief reasonable by looking at what were legitimate labor goals at the time of the agreement and whether a reasonable person could have believed the Rules were intimately related to those goals.

133. The case would still have been remanded to allow the trial court to decide whether the defendant had proved its reasonable belief that the collective bargaining agreement was intimately related to a legitimate labor goal, and whether the plaintiff had rebutted this presumption of exemption by proving that the defendant joined the agreement knowing the agreement was intended to be used by businesses for product market control.

both workable standards for courts to apply and coherent guidelines for collective bargaining parties to follow.

ADDENDUM

As this issue went to print, the Supreme Court acted on the labor aspect of the *Consolidated Express* case. In *NLRB v. International Longshoremen's Association*, 48 U.S.L.W. 4765 (June 20, 1980), the Court affirmed the District of Columbia Circuit in the latest case concerning the Rules on Containers, holding that the NLRB had erred as a matter of law in its definition of the work in controversy. The Court adopted a "broader" view of the work reacquisition attempt embodied in the Rules, and remanded the case to the NLRB for further proceedings. Since the *Consolidated Express* case hinged on this erroneous NLRB finding of a labor law violation, the Supreme Court also vacated the *Consolidated Express* decision. *Consolidated Express, Inc. v. New York Shipping Association*, 602 F.2d 494 (3d Cir. 1979), *vacated*, 48 U.S.L.W. 3845 (June 24, 1980).